FILE COPY

Supreme Court, U. S.
FILED
JUL 11 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 288

SID W. RICHARDSON, ET AL

Petitioners,

VS.

KEITH KELLY, RECEIVER,

Respondent.

Petition For Writ of Certiorari to the Supreme Court of Texas, and Brief in Support Thereof

John M. Scott, Attorney at Law,
1605 Fair Building,
Fort Worth, Texas.
Attorney for Petitioners.

INDEX

Petition For Writ of Certiorari to the Supreme Court of Texas, and Brief in Support Thereof

	Page
Summary Statement of the Matter Involved	2-4
Jurisdictional Statement	4-6
Questions Presented	6
Reasons Relied On For the Allowance of the Writ	7-9

Brief In Support of Petition For Writ of Certiorari

Opinions of the Courts Below	9-10
Jurisdiction	10-11
Statement of the Case	11-14
Specification of Errors	14-15
Summary of the Argument	15-16
Points One and Two (Restated)	16
Argument	16-30
Point Three (Restated)	30-31
Argument	31-46
Conclusion	46-47
Appendix	49-54

AUTHORITIES

United States Statutes:

Sec. 237(b) of the Judicial Code, as amended, 28 U. S. C. Sec. 344(b); 43 Stat. 937 4-5,10

Texas Statutes:

R. C. St. 1925, Chap. 20, Title 78 16

List of Cases:

Brusselback vs. Arnovitz, 87 Fed. 2d 2761 25

Pages

Campbell vs. T. & P. Ry. Co.
4 F. Cas. 2366, 1 Woods 368 32

Christopher vs. Brusselback, 302 U. S. 500,
82 L. Ed. 388, 58 Sup. Court 350....3,4,6,7,11,19,24,26,28,46

Farmers Coop. vs. Socony Vacuum Oil Co.,
133 Fed. 2d 101 20

Hansberry vs. Lee, 311 U. S. 32,
85 L. Ed. 22 6,7,8,11,19,22-23,31

Hartford Life Ins. Co. vs. Ibbs, 237 U. S. 662..... 21

Hunter vs. Southern Indemnity Underwriters,
47 Fed Supp. 242 20

Los Angeles Co. vs. Winans, 109 Pac. 640..... 32

Mennig vs. Groves, 234 N. W. 189 32

Miller vs. Barnwell Bros., 137 Fed. 2d 257..... 29

Old Wayne Mutual Life Insurance Co. vs.
McDonough, 204 U. S. 8 7

Oppenheimer vs. H. J. Young, 144 Fed. 2d 387.... 20
Partridge vs. Martin, 102 Fed. 2d 284..... 27-28

Pennoyer vs. Neff, 95 U. S. 715, 24 L. Ed. 565.....6,7,11,19

Pink vs. AAA Highway Express, 314 U. S. 201,
86 L. Ed. 152, 62 Sup. Court 241 28

Scott vs. McNeal, 154 U. S. 34, 38 L. Ed. 896,
14 Supp. Court 1108 19

Smith vs. Swormstedt, 16 How. 288 8,19,21,31

Supreme Council vs. Green, 237 U. S. 531,
59 L. Ed. 1089, 35 Sup. Court 692 19

Supreme Tribe of Ben Hur vs. Cauble, 255 U. S.
356, 65 L. Ed. 673, 41 Supreme Court 338..... 19,21

U. S. of America vs. Dick Johnson,
319 U. S. 302 8,44-45

Ussery vs. Darrow, 188 S. W. 885 32

Wheeler vs. Green, 280 U. S. 49 24

Text Books and Other Authorities:

Address Dean Clark, Member of Advisory Com-

	Pages
mittee speaking before the Institute on Federal Rules of Civil Procedure held in Washington, D. C., in 1938	20
30 American Jur. 963, Judgment, par. 228	32
2 Black on Judgments, 2nd Ed. par. 545	32
Corpus Juris, Vol. 21, pg. 285	33
Fed. Farm Loan Act, Sec. 16, Chap. 245, 39 Stat. at L. 374, 12 USCA, par. 812	24
Franki, Vernon's Tex. Rules of Civil Procedure, p. 60, et seq.	20
Freeman on Judgments, 5th Ed. par. 435,436	32
2 Moore's Federal Practice, par. 23.03-23.04, pgs. 2227-2245	20
E. R. Sunderland, 45 W. Va. L. Q. 5	20

IN THE

SUPREME COURT OF THE UNITED STATES

SID W. RICHARDSON, ET AL

Petitioners,

VS.

KEITH KELLY, RECEIVER,

Respondent.

Petition For Writ of Certiorari to the Supreme Court of Texas, and Brief in Support Thereof

---

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Sid W. Richardson, Richardson Oils Inc., Houston Transportation Company, Mid-Co Gasoline Company, K. C. Gray and L. W. Fritz, for themselves and to the extent authorized by law as representatives of other subscribers similarly situated, present this their petition for writ of certiorari to be directed to the Supreme Court of the State of Texas, to review a judgment of that Court rendered December 29th, 1945 (rehearing denied February 13th, 1946), affirming a judgment of the 53rd District Court of

Travis County, Texas, in favor of Respondent and against Petitioners. Time within which to file petition for certiorari has been extended by order of the Court until July 11, 1946.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action in the nature of a Bill of Review was brought by petitioners in the District Court of Travis County, Texas, to set aside a judgment theretofore rendered by said Court establishing the insolvency of the National Indemnity Underwriters of America, a reciprocal insurance exchange, and fixing the liability of the policy holders at said exchange to an assessment. (R. 148).

The original suit had been brought by Keith Kelly, Receiver of the Exchange, against twenty-eight former policyholders who were sued individually and as representatives of all other policyholders. Petitioners were not named as defendants in said cause, and were neither cited nor served in that proceeding. (R. 510).

Attacking the judgment rendered in the prior proceeding these petitioners filed the case at bar, alleging (1) that the former judgment establishing the *several* liability of the policyholders of the Reciprocal to assessment, if held binding on these petitioners deprived them of their property without due process of law, and (2) that because of the fraud

of the Receiver (in conducting the litigation, and in securing said judgment), petitioners were not in fact adequately represented by the parties who were present, and therefore have been deprived of their property without the due process of law guaranteed them under the Federal Constitution. (R. 172).

Trial of the instant Bill of Review before the Court without a jury, resulted in a judgment that petitioners were bound by the adjudication in the class suit, and on the cross-action of the Receiver judgment was rendered against petitioners for the amount of their respective assessments under the former judgment. (R. 179).

An appeal was taken by petitioners to the Court of Civil Appeals which affirmed the action of the trial court. (R. 752). Petition for Writ of Error was granted by the Supreme Court of Texas, where the judgment was again affirmed in a divided opinion, Chief Justice Alexander and Associate Justice Sharp dissenting. (R. 817).

The majority opinion holds that the Petitioners are bound by the prior adjudication of the insolvency of the Exchange, and of their several liability as subscribers to assessment, notwithstanding the fact that they were not parties to the suit, nor served with process therein. This holding is premised on the validity of the suit as a class action. The directly contrary holding of this Court in *Christopher v. Brusselback*, 302 US 500, 82 L. Ed. 388, 58 Sup. Court 350, is dismissed as being not in point. (R. 813).

The dissenting opinion by the Chief Justice points out that *Christopher vs. Brusselback, supra*, is squarely in point on almost identical facts, and that the majority opinion is in direct conflict therewith. (R. 828).

The dissent held further that even if the suit had been maintainable as a class action, the judgment secured therein was void because of the wrongful conduct of the Receiver first in selecting representative defendants whose interests were negligible, and then negotiating settlements with those selected so as to preclude the possibility of any real or active defense to the suit. (R. 820).

The majority opinion dismisses the uncontradicted proof of the Receiver's conduct by holding that the original class suit judgment recited that the absent and uncited subscribers were "fairly and truly represented herein by the named defendants appearing and answering," and that such recitation was conclusive. (R. 816).

II.

JURISDICTIONAL STATEMENT

Judisdiction of the Supreme Court of the United States is invoked pursuant to Judicial Code Sec. 237(b), as amended by the Act of February 13, 1925, 28 USC Sec. 344(b), 43 Stat. 937, reading in part:

"(b) It shall be competent for the Supreme

Court by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest Court of the State in which a decision could be had * * * Where any title, right , privilege or immunity is specially set up or claimed by any party under the Constitution * * *."

Petitioners in the Bill of Review filed by them to set aside the prior judgment establishing the insolvency of the inter-insurance exchange, and the several liability of the subscribers thereto to an assessment, alleged that they were not named as parties in said suit nor served with process therein, and that the former judgment if held binding upon them, deprived them of their property without due process of law. Petitioners further alleged that the course of the proceeding actually pursued by the Receiver in filing said original class suit, and in prosecuting it to judgment was such as to render the judgment obtained void as to these petitioners under the due process clause of the 14th Amendment to the Federal Constitution. (R. 172)

The due process question was preserved by appropriate assignment in the Court of Civil Appeals (R. 151), in the Supreme Court of Texas (R. 198), and duly assigned as error in motion for rehearing filed in that Court. (R. 242).

The judgment of the Supreme Court of Texas to

be reviewed is dated December 29th, 1945, motion for rehearing was overruled on February 13th, 1946, R. 846). The time within which to file petition for certiorari was extended to and including July 11th, 1946, by order of this Court dated May 9th, 1946.

The cases believed to sustain such jurisdiction are as follows: *Christopher vs. Brusselback*, 320 U.S. 500; *Hansberry vs. Lee*, 311 U. S. 32, *Pennoyer vs. Neff*, 95 U. S. 715.

III.

QUESTIONS PRESENTED

The first question presented is whether petitioners are bound by the adjudication in cause No. 63621, in their absence, of the existence and extent of the insolvency of an inter-insurance or reciprocal exchange at which they were subscribers, and of their several liability to assessment, and the amount of the assessment.

The second question presented is whether the Supreme Court of Texas, by its adjudication that petitioners in this case are bound by a judgment rendered in an earlier litigation (cause No. 63621) to which they were not parties, has deprived them of the due process of law guaranteed by the 14th Amendment to the Constitution of the United States.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A.

The majority opinion of the Supreme Court of Texas, decided a Federal question of substance under the 14th Amendment, as to the authority of named and cited defendants to stand in judgment for unnamed and uncited defendants, in favor of respondent by holding that petitioners were bound by the adjudication of the existence and the extent of insolvency of an inter-insurance or reciprocal exchange at which they were subscribers, and of their several liability to assessment and the amount thereof in a prior suit to which petitioners were not parties, which decision is not in accord with the decisions of this Court including the case of *Christopher vs. Brusselback*, 302 U. S. 500, *Hansberry vs. Lee*, 311 U. S. 32, *Old Wayne Mutual Life Insurance Company vs. McDonough*, 204 U. S. 8, and *Pennoyer vs. Neff*, 95 U. S. 714.

B.

The majority opinion of the Supreme Court of Texas decided a Federal question of substance under the 14th Amendment as to the authority of those named as representatives of a class to represent the interest of the absent members of the class, in favor of respondent, by holding that the deliberate omission as defendants of those whose interests were substantial, and the selection as defendants of those

whose interests were negligible and the convert negotiations of settlement with those so selected, effectively eliminating all contest of the suit, constituted such conduct of the litigation as to insure the full and fair consideration of the common issues, which decision is not in accord with the decisions of this Court, including the cases of *Hansberry vs. Lee*, 311 U. S. 500, *Smith vs. Swormstedt*, 16 How. 288, and *U. S. of America vs. Dick Johnson*, 319 U. S. 302.

C.

The majority opinion of the Supreme Court of Texas decided a Federal question of substance in a way probably not in accord with the applicable decisions of this Court, in that it held that these petitioners, and others similarly situated, are legally bound by the judgment rendered in a suit to which they were not parties, and of which they had no notice, where the record affirmatively shows without controversy that the procedure adopted in such asserted class action was not such as to fairly insure the protection of the interests of parties made defendants by representation only, which decision is probably not in accord with the decisions of this Court including the cases of *Hansberry vs. Lee*, 311 U. S. 500, *Smith vs. Swormstedt*, 16 How. 288, *U. S. vs. Dick Johnson*, 319 U. S. 302.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of Texas, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the

proceedings of the said Supereme Court of Texas had in the case numbered and entitled on its docket No. A-196, *Sid W. Richardson, et al Petitioners, vs. Keith Kelly, Receiver, Respondent,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Supreme Court of Texas be revised by the Court, and for such further relief as to this Court may seem proper.

Dated the 4th day of July, 1946.

SID W. RICHARDSON,
RICHARDSON OILS, INC.,
HOUSTON TRANSPORTATION COMPANY,
MID-CO GASOLINE COMPANY,
K. C. GRAY,
L. W. FRITZ,
By John M. Scott
John M. Scott, Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

The opinion in the Court of Civil Appeals for the Third Supreme Judicial District of Texas is reported in 179 SW (2d) 991 (R. 752). The

majority and dissenting opinions of the Supreme Court of Texas are reported in 191 SW (2d) 857. (R. 801).

II.

JURISDICTION

(1) The date of the judgment to be reviewed is December 29th, 1945. (R. 834). Motion for rehearing was overruled on February 13th, 1946. (R. 846). The time within which to file petition for certiorari was extended to and including July 11th, 1946, by order of this Court dated May 9th, 1946.

(2) The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code Sec. 237(b), as amended by the Act of February 13, 1925, 28 USC Sec. 344(b), 43 Stat. 937.

(3) Petitioners, in the Bill of Review filed by them to set aside the prior judgment establishing the insolvency of the insurance exchange, and their several liability as subscribers to assessment, alleged that they were not named as parties in said suit, nor served with process therein, and that the former judgment, if held binding upon them, deprived them of their property without the due process of law guaranteed by the 14th Amendment to the Constitution of the United States. (R. 172). Petitioners further alleged that the course of the proceeding actually pursued by the Receiver in filing said

original class suit, and in prosecuting it to judgment, was such as to render the judgment obtained void as to these petitioners, under the due process guaranty of the 14th Amendment to the Federal Constitution. (R. 173).

The due process question was presented by appropriate assignment of error in the Court of Civil Appeals (R. 751), and in the Supreme Court of Texas (R. 798) and duly assigned as error in the motion for rehearing filed in that court. (R. 842).

(4) The cases believed to sustain such jurisdiction are as follows: *Christopher vs. Brusselback*, 320 U. S. 500, 82 L. Ed. 388, 58 Sup. Court 350; *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22, 61 Sup. Court 115; *Pennoyer vs. Neff*, 95 U. S. 715, 24 L. Ed. 565.

III.

STATEMENT OF THE CASE

The summary statement of the matter involved in the preceding petition (p. 2 to 4) is adopted and made a part of this brief. Supplementing that statement petitioners would show further that the original class suit, being cause No. 63621, was filed in 1940, ~~May, 1939~~, by the Receiver, the named defendants being sued individually and as representatives of 3200 other subscribers. (R. 554). On ~~May~~ March 8th, 1941, judgment was rendered in the cause against the named de-

fendants as well as all the members of the class. The judgment after finding as a fact the insolvency of the National Indemnity Underwriters, adjudicated the liability of the subscribers for an assessment to make up the losses. (R. 664). The judgment in the case became final on April 8th, 1941, no appeal therefrom having been taken. The present Bill of Review was filed in the same Court on May 16th, 1941, by Sid W. Richardson and Richardson Oils, Inc., the other petitioners subsequently intervening. (R. 804). The Receiver in said cause filed his cross-action, seeking to recover from petitioners severally the amounts of their respective assessments in the event the prior judgment was held to be valid. (R. 103).

It is the ruling of the trial court, affirmed on appeal by the Supreme Court of Texas, that petitioners were bound in their absence by the judgment in cause No. 63621 that these petitioners complain of.

A brief resume of the history of the litigation is deemed important. Prior to the filing of the class suit here complained of the Receiver Kelly had brought a suit in the same trial court, being cause No. 61778, styled Keith Kelly, Receiver vs. Sid W. Richardson, et al, in which Richardson, Richardson Oils, Inc., and Houston Transportation Company and one hundred eighty-nine others were named as defendants. (R. 510). Petitioners contested that suit and prepared to defend it (R. 321-23), but on December 9th, 1939, the Receiver caused it to be dismissed. (R. 243). Thereafter on July 11th, 1940, the Receiver Kelly instituted the complained of class suit, being cause

No. 63621, naming twenty-eight defendants individually and as class representatives of the other subscribers. Petitioners who were parties to the first suit were deliberately omitted from the latter. (R. 266).

Of those named as defendants, including three who intervened, twelve had liabilities of less than $100.00; eleven had liabilities of less than $200.00; three had liabilities of less than $300.00, and the claims against the other five ran from $441.00 to $801.00. (R. 821).

During the pendency of the proceeding the Receiver dismissed two defendants, six defendants defaulted, twenty defendants filed answers. (R. 821). On the day of the trial five of them with the approval of the Receiver, paid into Court the small amounts due by them, and thereafter made no defense. (R. 821). Prior to the trial the Receiver discussed settlement with ten of the other defendants who filed answers. Thereafter these ten defendants made no further contest. (R. 821). On the day of the trial the Receiver made an agreement with the attorney representing one defendant and the three interveners, that if he would not resist the suit and would suffer Kelly to recover judgment, that no execution would ever issue against his clients. (R. 286). One defendant with a liability of only $124.00 appeared at the trial, but presented no defense and did not give notice of appeal. (R. 219). The three remaining defendants excepted to the order and gave notice of appeal. Two of them with whom settlement agreements had been discussed prior to the trial were settled with shortly

after the order became final for much less than the amount adjudged against them. (R. 260). The remaining defendant who had excepted to the order had a liability of only $18.00. The result was that no one prosecuted an appeal from the judgment.

The majority opinion of the Texas Supreme Court held that regardless of the uncontroverted proof of the facts outlined above, in view of the recitation in the original class judgment that the class subscribers had been "fairly and truly represented by the named defendants appearing and answering," the question had been foreclosed. (R. 816).

IV.

SPECIFICATION OF ERRORS

1. The Supreme Court of Texas erred in holding that petitioners were bound, in their absence, by the prior judgment in cause No. 63621.

2. The Supreme Court of Texas erred in holding that said cause No. 63621 was maintainable as a class suit, the object of the suit being to enforce the *several* obligations of the subscribers of a reciprocal insurance exchange to assessment.

3. The Supreme Court of Texas erred in holding that the judgment in the class suit was binding on the absent and uncited subscribers in view of the uncontroverted proof of the Receiver's conduct in tampering with and in covertly negotiating settlement

agreements with the named defendants so as to thwart any real assertion of a defense in behalf of the absent members of the class.

V.

ARGUMENT

SUMMARY OF THE ARGUMENT

Under Points One and Two petitioners assert that the class suit device was not available to the Receiver to enforce the *several* obligations of the subscribers. The purpose of the orginal suit was to impose a personal and several liability on the members of the class for the debts of the defunct concern, and was therefore an action in personam in which jurisdiction over the person of petitioners was essential to the validity of the judgment.

There being no statutory provision authorizing the imposition of an assessment on petitioners without notice to them and without an opportunity to defend, the procedure adopted in the class suit was unsanctioned and the judgment secured thereby, if held binding, deprives petitioners of their property without due process of law.

Under Point Three petitioners concede, arguendo, the availability of the class suit device under the circumstances here involved, but assert the proposition that due process requires that the suit be fairly and honestly conducted, and that a full, fair and impartial trial be had in which the interest of the ab-

sent members of the class shall receive full and complete protection. Where the proponent of a class suit deliberately excludes from the suit defendants whose interests are substantial enough to insure their appearing to contest the suit, and instead selects as representative defendants those whose interests are negligible and then proceeds to tamper with and covertly negotiate settlements with those selected, stifling the presentation of any defense whatsoever in behalf of the absent and excluded members of the class, the judgment thus procured, cannot, consistent with the requirements of due process, bind the absent members.

POINTS ONE AND TWO

(Restated)

The Supreme Court of Texas erred in holding that the prior suit in Cause No. 63621 was a valid class suit, and that petitioners though not parties to said suit nor served with process therein, were bound by the judgment rendered in said cause.

ARGUMENT

The policyholders of the National Indemnity Underwriters became subscribers thereto by executing a power of attorney, by which each of them severally appointed an attorney in fact to effect the exchange of insurance. The applicable State law, Chapter 20, Title 78, Revised Civil Statutes of Texas, 1925, is found in the appendix hereto.

Petitioners in the State Courts have urged that the

applicable power of attorney on file with the State Board of Insurance Commissioners provided against contingent liability, and was entirely different from the power of attorney submitted in evidence in the class suit by the Receiver, and under which the obligation to contribute pro rata to pay the losses of the exchange to the extent of one additional premium was held to exist.

The question of meritorious defense, however, is not necessary to a decision of the Due Process questions before this Court. Petitioners here assert the proposition that in any suit to enforce a liability against them individually, due process of law guarantees to them the right to contest every step essential to the establishment of that liability, and that a judgment rendered against them without their having been heard is not binding upon them.

The provisions of the power of attorney relied on by the Receiver, authorized the attorney in fact to act for the subscribers in the exchange of insurance contracts. It provides in part as follows:

> "Provided, however, that the amount exchanged for me on any one risk shall in no case exceed the amount hereinafter subscribed by me; and provided further that the total amount exchanged for me during any year shall not exceed double the amount of my premiums for that year.
>
> "Provided, however, that said attorney shall not have power to bind jointly subscribers, but

> he shall have power to bind severally each subscriber." (R. 572).

The petition in cause No. 63621 asserted that under the foregoing power of attorney each subscriber became bound severally but not jointly for his pro rata part of the indemnity granted by the Association not to exceed one additional annual premium on the policy issued to him. (R. 568).

The judgment in cause No. 63621, found that the Exchange was insolvent, that the subscribers were bound severally but not jointly to the extent of one additional annual premium, that an assessment equal to one additional premium was necessary, and decreed in favor of the Receiver for such assessment. The judgment further provided:

> "It is further ordered, adjudged and decreed by the Court that the liabilities decreed herein shall be several as to each of such subscribers * * * and not joint." (R. 665).

The question decisive of the case now before the Court is whether petitioners are bound by the foregoing adjudication, in their absence, of the Associations insolvency, the extent thereof and of their liability to assessment and the amount thereof.

It is a cardinal principle of our jurisprudence that no person shall be concluded by a judgment of a Court either in respect to his person or property, in any litigation in which he is not designated as a party, or to which he has not been made a party by

service of process or appearance. *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22, 61 Sup. Court 115. *Scott vs. McNeal*, 154 U. S. 34; 38 L. Ed. 896; 14 Sup. Court 1108; *Pennoyer vs. Neff*, 95 U. S. 714; 24 L. Ed. 565; *Christopher vs. Brusselback*, 302 U. S. 500; 82 L. Ed. 388, 58 Sup. Court 350.

To the general rule there is an exception which permits a Court under some circumstances to render a judgment in a class suit to which some members of the class are parties, which binds other members of the class who are not named as parties thereto. *Hansberry vs. Lee*, 311 U. S. 32, 86 L. Ed. 22, 61 Sup. Court 115; *Smith vs. Swormstedt*, 16 How. 288, 14 L. Ed. 942; *Supreme Council vs. Green*, 237 U. S. 531, 59 L. Ed. 1089, 35 Sup. Court 692; *Supreme Tribe of Ben Hur vs. Cauble*, 255 U. S. 356, 65 L. Ed. 673, 41 Supreme Court 338; cf. *Christopher vs. Brusselback, 302 U. S.* 500, 82 L. Ed. 388, 58 Sup. Court 350.

The representative or class suit is a creature of equity. It is not available to a party as a mere convenience to avoid a multiplicity of suits. It grows out of the necessities of the case, and is permitted upon the assumption that those who are sued as representatives of others who are absent have such an identity of interest that the natural instinct for self-preservation will cause the representative, in protecting himself, to protect at the same time, the interest of all others whose rights are involved.

The present Federal and Texas rules of procedure

authorizing the use of the class suit device under certain stated circumstances introduced no new principles of law but merely expressed the operating principles by which the Courts have always been guided in dealing with class suits.[1] The rules therefore are definitive of the equity practice as it has always existed, and disclose three distinct forms of the class action.

The first is the true class action where the rights sought to be enforced are joint, common or secondary.

The second or hybrid class suit deals with the adjudication of claims of property.

The third or spurious class suit is authorized where the right sought to be enforced is *several* and there is a common question of law and fact affecting the *several rights* and a common relief is sought. The first two are really the proper cases of class suits where the result is held to be res adjudicata as to those who are represented.

In the third it is not binding, being merely a permissive joinder device.[2]

A few cases will illustrate the character of the

---

[1]E. R. Sunderland, 45 W. Va. L. Q. 5. Franki, Vernon's Texas Rules of Civil Procedure, p. 60 Et. Seq.

[2]Address Dean Clark, member of the Advisory Committee speaking before the Institute on Federal Rules of Civil Procedure held in Washington, D. C., in 1938. **Farmers Coop vs. Socony Vacuum Oil Co.**, 133 Fed. 2d 101, **Oppenheimer vs. H. J. Young Co.**, 144 Fed. 2d 387; **Hunter vs. Southern Indemnity Underwriters**, 47 Fed. Supp. 242; 2 **Moore's Federal Practice**, Par. 23.03-23-04, pgs. 2227-2245.

common or joint jural relationship which must exist in order to base the true class suit.

In *Hartford Life Insurance Co. vs. Ibbs*, 237 U. S. 662, the insurance company had made a larger assessment against its policy holders than was necessary to pay existing claims. Some of the policyholders brought suit on the part of all others of the class to require the company to distribute the accumulated fund on hand among the policyholders instead of retaining it for the payment of future claims. The Supreme Court held that this was a proper class action because the ownership of the fund thus accumulated was one of common interest to all the policyholders.

In *Smith vs. Swormstedt*, 16 How. 288, 14 L. Ed. 842, the suit was brought by some members of the Methodist Episcopal Church South for themselves and as representatives of all other members against some of the members of the Methodist Episcopal Church of the United States as representatives of all other members thereof for a partition of jointly owned property. This was held to be a proper class action because it involved property in which all of the members of the class had a common interest.

In *Supreme Tribe of Ben Hur vs. Cauble*, 255 U. S. 356, 65 L. Ed. 673, 41 Supreme Court 338, the suit was brought by 574 members of Class A to enjoin the use of trust funds of the defendant in which other members of Class A and the complainants had a common but indivisible interest, and attacking a

plan of reorganization of the society. The Court held that the suit was a proper class action because it involved the funds of the organization in which all the members had a common interest.

The distinction between this type of case and the case at bar is readily apparent. Each of the foregoing cases involved the rights of the members of the alleged class in a fund or in property owned by them in common. None of the cases involved an attempt to recover on the *several obligations* of the members of the alleged class. In the case at bar the subject matter is not a fund which exists made up by contributions from the subscribers, but is to enforce the *several* contractual obligations of the subscribers to pay pro rata the losses of an insurance exchange.

The distinction is well illustrated by the case of *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22. In that case various purchasers of lots had accepted deeds containing restrictions against the sale of lots to members of the colored race. Some of the owners in the Addition brought suit against other lot owners individually and as representatives of all others in the Addition, seeking to cancel the restrictions as against all owners of lots in the Addition. The judgment held that the restrictions were no longer enforceable.

An action was later brought to enjoin the breach of the restrictive conditions by the owners of property in the Addition. To this suit the defense was

pleaded that the prior decision adjudicating the invalidity of the restrictions was res adjudicata. The Supreme Court held that the property owners who were not actual parties to, nor participants in the prior proceedings were not bound by the judgment. The Court stated:

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment (1) *where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties.* Plumb v. Goodnow (Plumb v. Crane, 123 U. S. 560, 31 L. Ed. 268, 8 S. Ct. 216; Confectioners' Machinery & Mfg. Co. vs. Racine Engine & Machinery Co. (CC) F. 914 (CCA 7th) 170 F. 1021; Bryant Electrict Co. v. Marshall (CC) 169 F. 426, or (2) *Where the interest of the members of the class, some of whom are present as parties, is joint, or* (3) *where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.* Smith v. Swormstedt, 16 How, U. S. 288, 14 L. Ed. 942, Supra; cf. Christopher v. Brusselback, supra, (302 U. S. 503, 504, 82 L. Ed. 390, 391, 58 Ct. 350), and cases cited.
>
> "*The restrictive agreement did not purport to create a joint obligation or liability. If valid and effective its promises were the several obligations of the signers and those claiming under them.* The promises ran severally to every other

signer. It is plain that in such circumstances all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it.

The Supreme Court of the United States has had the precise question before it in the series of cases involving the liquidation of Federal Joint Stock Land Banks.

The liability of the shareholders of such banks is *several and not joint* under Section 16, Fed. Farm Loan Act, Chap. 245, 39 Stat. at L. 374; 12 U.S.C.A. par. 812, in which the shareholders are declared to be

> "Individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof in addition to the amount paid in and represented by their shares."

Following the decision of the Supreme Court in *Wheeler vs. Green*, 280 U. S. 49, holding that the Federal Farm Loan Board had no authority to levy an assessment, and that the only means of enforcing the liability was by an adversary suit in equity by the creditors, many cases were brought in the lower Federal Courts by creditors against the stockholders of various insolvent joint stock land banks.

In the case of *Christopher vs. Brusselback, Supra*, a case almost identical with the case at bar, the

creditors of the Bank brought a class action in Illinois against all the shareholders of the Bank, and obtained a judgment fixing an assessment against all the shareholders for their proportionate share of the indebtedness. Suit was then brought on the Illinois judgment in the Federal Court in Ohio against the shareholders of the Bank to collect the amount of the assessment. The Circuit Court of Appeals held that the judgment in the class action in Illinois was binding on all members of the class regardless of whether they were actually before the Court in the class action. *Brusselback vs. Arnovitz*, 87 Fed. 2d 2761.

When the case reached this Court the judgment was reversed and the Illinois adjudication in the alleged class action was held invalid.

After reviewing the provisions of the applicable Statute fixing the stockholder's liability the Court stated:

> "The obligation which the statute imposes upon the stockholders is personal, and petitioners can be held to respond to it only by a suit maintained in a court having jurisdiction to render a judgment against them in personam. As the liability of the stockholders is to pay the debts of the bank to creditors "equally and ratably" judicial determination of the inability of the bank to pay its debts and the amount to be assessed against the stockholders to meet the deficiency are prerequisites to the enforcement of liability, and are essential parts of the only

cause of action which the statute gives to the creditors. It is plain that in such a suit the existence and extent of insolvency are facts, the allegation and proof of which cannot be dispensed with as to any stockholder unless, as between the parties to the suit they are matters already adjudicated.

"The statutes have fixed only the conditions on which liability of the shareholders is to attach, leaving to creditors as their only recourse the usual procedure of courts as the means of asserting the liability. There is nothing in the statute relating to the organiaztion of Federal Land Banks and the imposition of the stockholders' liability to suggest that by virtue of their membership in the corporation the stockholders can be said to have subjected themselves to a procedure for determining in their absence the essential conditions of liability, or to have relinquished their right to contest, as in any other litigation, every step essential to its establishment. As we cannot say that petitioners' membership in the bank was conditioned upon their surrender of the benefits of a procedure which would otherwise be required, there is no basis for a court to dispense with it more than in other cases in which a personal judgment is sought.

"In the circumstances the decree in the Illinois suit was not res adjudicata as to petitioners in any respect."

Following the decision of the Supreme Court in *Christopher vs. Brusselback, supra*, litigation arose out of the liquidation of the St. Louis Joint Stock

Land Bank. Partridge in behalf of all creditors brought suit against eleven of the principal stockholders of the bank individually and as class representatives of all other shareholders. Later a separate suit was filed by Ball in behalf of all creditors against all of the named defendants in the Partridge suit and one hundred sixty-nine others who were sued individually and as representatives of a class, to-wit, all stockholders of the Bank. The defendants in the Ball suit filed a motion to dismiss on the ground that the scope of the Partridge action was identical with the suit against them, and that the jurisdiction of the Court had been first invoked in that suit. This motion was first granted and then set aside by the trial court on the ground that since each suit was an action in personam, and the judgment of recovery would be binding only on persons sued and served, the prosecution of the two suits therefore would not be inconsistent.

The Circuit Court of Appeals for the Eighth Circuit in *Partridge vs. Martin*, 102 Fed. 2d 284, affirmed the action of the trial court saying:

> "Certainly as to the shareholders living in other states no adjudication could have been obtained in this case which would be binding upon them. Christopher vs. Brusselback, 203 U. S. 500, 82 L. Ed. 388, 58 Sup. Court 350; Holmberg vs. Carr, 8 Fed 2d 727. It is equally clear that no adjudication could have been obtained herein prior to the institution of the Ball suit which would have been binding upon the great body of shareholders resident in Mis-

souri, but not served with summons under the bill of complaint herein. Christopher vs. Brusselback, supra."

Application for certiorari was denied. 307 U. S. 644, 84 L. Ed. 1525, 59 Sup. Court 1042.

This Court in its decisions states the rule to be that the existence under a Statute or contract of an additional several liability of shareholders or subscribers for the debts of the Association does not deprive them of their day in Court to resist the imposition of an assessment *unless some procedure or mechanism has been set up by Statute or contract* under which the corporation or association may be brought into Court for the determination of insolvency and the amount of an assessment, so that the subscribers may be deemed to have consented to such an ex parte determination by virtue of having accepted membership in the Association.

The converse of the principle laid down in *Christopher vs. Brusselback* is established by the holding in *Pink vs. AAA Highway Express*, 314 U. S. 201, 86 L. Ed. 152, 62 Sup. Court 241. The Court there decided that the New York Statute which provided that any mutual insurance company shall specify the extent of the contingent liability of members for losses, and that all assessments whether levied by the Board of Directors, by the Superintendent of Insurance, in the liquidation of the corporation or otherwise, shall be for no greater amount than that specified, *provided the mechanism for an assesment* and that the members of the mutual by be-

coming such, had consented to the imposition of an assessment in such manner, and that the judgment in a class suit, to which a member was a party by representation only, establishing the necessity for and amount of the assessment was binding upon him.

The late Chief Justice was the author of the opinions in Christopher vs. Brusselback, supra and Pink vs. AAA Highway Express, supra, and the two cases taken together illustrate clearly the conditions under which the subscribers at a mutual or reciprocal insurance exchange may be bound by the judment although not parties to the suit.[1]

In the case now before the Court the applicable Texas Statutes impose no contingent liability on the subscribers, and of course, provide no mechanism for determining the necessity for and amount of any assessment. The power of attorney of each subscriber is the only contract involved. Assuming that under it, the subscriber became liable for an additional annual premium if the losses of the exchange were such as to require it, there is no procedure provided in the contract for the levy of an assessment. These petitioners therefore, by accepting membership in the exchange, did not consent to an ex parte determination of their liability in a suit to which they were not parties and of which they had no knowledge.

It has been demonstrated that the powers of at-

---

[1]Miller vs. Barnwell Bros., 137 Fed. 2d 257.

torneys sued on in the alleged class action provided that the subscribers were bound *severally* and not jointly. The judgment prayed for was a *several* and not a joint judgment, and the judgment actually rendered was *"several as to each subscriber * * * and not joint."*

The purpose of the suit was to impose a personal liability on the absent subscribers for the debts of the exchange. It was therefore an action in personam. Jurisdiction over the person of the absent members of the class was essential to the validity of the judgment. We submit that the judgment against these petitioners who were not named as defendants in the suit, and had no notice thereof, and who did not participate therein, is contrary to the requirements of the due process clause of the Federal Constitution.

The judgment of the Supreme Court of Texas that petitioners are bound by the prior adjudication in Cause No. 63621, and that petitioners must pay the assessment based on that judgment should be reversed.

POINT THREE

(Restated)

The Supreme Court of Texas erred in holding that the judgment in the class suit was binding on the absent and uncited subscribers in view of the uncontroverted proof of the Receiver's conduct in tampering with and in covertly negotiating settlement agree-

ments with the named defendants so as to thwart any real assertion of a defense in behalf of the absent members of the class.

ARGUMENT

In *Smith vs. Swormstedt*, 16 How 288, 14 L. Ed. 948, it is stated:

> "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, *so that it may be fully and honestly tried.*"

In *Hansberry vs. Lee*, 311, U. S. 32, this Court stated that State Courts may attach descriptive labels to litigations before them as they may choose, and may attribute to them such consequences as they may think appropriate, subject only to the requirements of the Constitution of the United States. In this connection the Court held

> "But when the judgment of a state court ascribing to the judgment of another court, the binding force and effect of res judicata is challenged for want of due process, *it becomes the duty of this Court to examine the course of procedure in both litigations*, to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."

In discussing class suits in general, and the equit-

able considerations which justify the use of the class suit, in certain situations, the Court further held that

> " * * * * * where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the Court will proceed to a decree * * * * * "
>
> "* * * This Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it."

From the foregoing decisions by this Court it follows that the very basis for the exception involved in the class suit device is the assumption that the parties of record by reason of self-interest, will fully and fairly present the issues involved, and by so doing insure a full and complete trial for themselves and for the absent members of the class. As a requisite to the validity of the proceeding it must appear that the procedure actually followed was such as to insure the protection of interest of absent parties.[1]

In *Campbell vs. T. & P. Ry. Co.* 4 F. cas. 2366, 1 Woods 368, it was held that any deviation from the requirement of utmost fairness and good faith, would

[1]Freeman on Judgments, 5th Ed. par. 435, 436. 2 Black on Judgments, 2nd Ed. par. 545. 30 Am. Jur. 963, Judgments, par. 227. Ussery vs. Darrow, 188 So. 885; Mennig vs. Groves, 234 N. W. 189; Los Angeles Co. vs. Winans, 109 Pac. 640.

be a proper ground for setting aside the judgment at the instance of an omitted party.

In 21 C. J. 285, the rule is thus stated:

> "Where parties, any one of whom would have a right to come in by petition and be made a party, if necessary to protect his interest, are allowed to be dispensed with on account of their number, *the parties of record ought to proceed with the utmost fairness and good faith, and should not resort to anything like sharp practice in procuring a final decree which is to be binding on all.*"

With the rule established by the foregoing authorities in mind, we call the Court's attention to the following uncontradicted testimony: The receiver, Keith Kelly testified that he had deliberately omitted to make Sid W. Richardson, Richardson Oils, Inc., Houston Transportation Co., and other petitioners who had filed pleadings in the first suit (Kelly Receiver vs. Sid W. Richardson, et al — No. 61778), party defendants to the class suit in cause No. 63621. (R. 266). With reference to the actual selection of the representative defendants Kelly testified, "I don't know what went on in my mind at the time I selected the defendants to represent the class." (R. 267).

Kelly testified that he had made settlement with T. B. Hill on April 22, 1941, after having discussed the matter and possibility of settlement with Hill's attorney on several occasions prior to the time the cause came on to be tried and thereafter; that the exact date upon which the agreement was reached was unknown but that it was several days prior to

the time it was actually consummated, Kelly testified further that Mr. Carlisle Cravens, of the firm of Cantey, Hanger, McMahon, McKnight & Johnson, of Fort Worth, represented four named defendants, H. E. Cannon, B. C. Bates, Livestock Commission Company and J. M. Garrett. That he had had many discussions with Mr. Cravens concerning his clients' purported liability, both before and after the trial and before the judgment became final, and that Mr. Cravens had told Kelly that he did not think he would be at the trial. (He did not appear at the trial). The testimony further established that Kelly had corresponded with the attorney for Morris Catchman after the suit was filed but before the trial, and that Catchman had tendered the amount of his assessment into the registry of the court. That the same thing was true as to C. W. Lott and Lockhart Produce Company, Inc. Kelly further testified that he had discussed the possibility of settling the Foxworth-Galbraith Lumber Company claim; that he had had some correspondence and had talked to Judge Guy Rogers, of Wichita Falls, on the telephone concerning the matter prior to the time the judgment became final, but that the final settlement was made with his client on or about April 17, 1941. Kelly further testified that the matter of the O. K. Warehouse Company liability was discussed with the attorney for that company prior to the time suit came on for trial, and that the amount claimed was tendered into court and that they made no further appearance in the case; that the same thing occurred with reference to the claim against the Oakhurst

Land Company, represented by Todd, Crowley & Thompson of Fort Worth, and that he had discussed the matter of the claim with said attorneys after said suit was filed and before the time of trial, and had told them that the most he could recover against them was the amount of their assessment, which was $119.48. The Rogelein Packing Company, at San Antonio, was represented by Terrell, Davis, Hall & Clemmons of San Antonio, and the testimony was that prior to the time the case came on for trial, settlement of their claim in the amount of $436.26 had been discussed; that they did not appear in the trial, and that on April 23, 1941, the claim was settled for fifty per cent of its amount. Kelly further testified that the Riddle Oil Company, whose potential liability was $801.77, and which company appeared at the trial of the case by its counsel, and who gave notice of appeal from said judgment, was settled with for $200.00 on April 22, 1941, but that he had discussed the matter of settlement with Willis Gresham, the attorney for said company, prior to the time the case came on for trial. That notice of appeal from the judgment was given by T. B. Hill, Harry Joseph and Riddle Oil Company, and that settlements were made with Hill and Riddle Oil Company, leaving the defendant, Joseph, as the only one entitled to appeal, and that Joseph's entire liability was $18.00 (R. 253-260 Kelly testified that he named 29 defendants in Cause No. 63621, and that there were approximately 3200 subscribers at the National Indemnity Underwriters. (R. 243).

Judge Guy Rogers of Wichita Falls testified that

he was a lawyer; that he resided in Wichita Falls; that his firm was Rogers & Montgomery; that he had been a County Judge and District Judge; that he represented Foxworth-Galbraith Lumber Company, one of the named defendants in Cause No. 63621; that the Lumber Company was served with process and it was delivered to his firm for legal defenses; that he had filed pleadings in cause No. 63621, it being his recollection that he filed a plea of privilege; that after he filed the plea of privilege, and after the case was set for trial, Kelly came to Wichita Falls and saw him; that Kelly walked into his office and said: " '*You have caused me a lot of trouble about this thing*', and said that he '*thought we represented a client whose interest was so small that he would not contest it*'; *that he had not been sued for enough to justify his client for defending it, and 'what you doing this for'*." That he told Kelly that his firm had represented Foxworth-Galbraith through the years, and that they were simply taking care of their interests; that he mentioned settling the case with him and disposing of it without his having to defend it, and without his going to Austin and participating in the suit; *that it was agreed that he would not go to Austin and defend against the controverting plea, and that in time a release would be executed whereby for a given sum of money, Foxworth-Galbraith would be absolved*, and that the amount of money was too small to justify his going ahead with the defense of the suit; that up to that time he had intended to present a defense; *that as a result of the conference with Kelly,*

a settlement was agreed upon; that he agreed he would no longer press or urge the plea of privilege; that nothing further was done by way of defense—that Kelly carried out his promise and the suit against Foxworth-Galbraith was afterwards settled—that Kelly lived up to his promise, and that they settled for the identical amount agreed upon; that the conversation and agreement he had with Kelly before the judgment was taken in Cause No. 63621; that he did not go to Austin on the date of February 21, 1941, and that he made no other defense on behalf of Foxworth-Galbraith after making the agreement with Kelly; that when Kelly approached the settlement, Kelly said: "Well, I'll beat you down there"; and Kelly said: "You've got me all messed up"; and Kelly said: "The reason I settled it with you". (R. 299-304).

The witness, S. B. Holloway, testified that he was a lawyer associated with the firm of Thompson and Barwise, of Fort Worth; that he represented the Brownwood Public Service Company in cause No. 63621; that his client was served with process; that he filed formal answer, on October 3, 1940; that after he filed the formal answer and prior to February 21, 1941, when the case came on for trial, he had several conversations with Kelly; that he attempted to keep up with the case, having in mind that if necessary he would go to Austin and fight the suit; that at Kelly's office, Kelly mentioned the possibility of a settlement; that later he got notice that the case was set for trial for February 14, 1941, and it was postponed to the following week; *that prior to the*

date of February 14th, he had an understanding with Kelly; that he told Kelly he was going down there and appear on behalf of his client unless he had some understanding about it; and Kelly said: "Well, I will tell you what I will do; *I will tell you now, I will give you at least a one-third discount on the amount claimed*"; that he told Kelly: "If we have that understanding that you will settle with me on that basis, give me a letter to that effect, and I will dismiss it from my mind, and you can go about your business and try your case and do whatever you want to do in the matter as far as I am concerned, if I am assured you will settle with me by accepting a definite percentage of the claim".; that pursuant to this conversation, *Kelly wrote him a letter stating in substance that it would serve as assurance that if and as he obtained a judgment in the case, he would make a separate settlement with Brownwood Public Service Company at a certain stated percentage fixed in that letter;* that this occurred prior to February 14, 1941; that he insisted upon having the letter before the trial; that after the judgment was finally taken, he did settle; that the settlement was consummated on January 6, 1942; that he paid Kelly $50.00; that his client sent him a check for $78.25 in settlement of the claim; that in the meantime, he learned that several subscribers whose liability was large, were preparing to file suit to set the judgment aside and he thought it well to await further developments, and that he also learned that Kelly was very much concerned over the contents of the letter he had written regarding the settlement, and Kelly was

afraid the letter would be embarrassing to him in his controversy with the other defendants; that having this situation in mind, instead of offering Kelly the amount of $78.25, that he offered him $50.00 and the return of his letter, and that Kelly accepted his proposition; that *Kelly had told him that he wanted to get that letter back; that his language was in effect that he had stuck his neck out, and was out on a limb, and that he wanted to get possession of the letter*, and he told Kelly that if and when he settled his client's liability, that he would return the letter to him, and that when he made the settlement, he would return the letter to Kelly, that he returned the letter and Kelly carried it away with him (R. 311-317

Captain O. Shelley Evans testified: That he was presently a Captain in the U. S. Army; that prior to going into the Army, he was a lawyer, and resided at San Antonio, Texas; that he represented W. H. Balzen, one of the named lefendants in cause No. 63621; that he was acquainted with Kelly; that he was present in the 98th District Court of Travis County, Texas, on February 21, 1941, at the trial of Cause No. 63621; that none of his clients were personally present; that there were two other attorneys representing subscribers present at the trial; that none of the subscribers were present; that no person was present except the attorneys, the judge, the court reporter, and an auditor or bookkeeper; that he conferred with Kelly prior to the time that cause No. 63621 came on for trial; that he and Kelly had a conversation in the courthouse in the morn-

ing; that the court stated the case would be tried at 2:30 p. m., and that he and Kelly went to the cafe across the street from the courthouse; that while in the cafe, he and Kelly discussed the merits and the course of action open to his clients; that Kelly tried to convince him that an assessment was just and proper, and that since he had been connected with the claim department of the National Underwriters, that I should favor an assessment; that he stated to Kelly that he represented Krisch & Lanham, R. C. Crawford, W. R. Trailkill and W. H. Balzen, and that his interest in the law suit was to successfully defend for the clients who had employed him; that he told Kelly that he had prepared an adequate defense for his clients, and thought that he ought to prevail; that after some discussion of the law, Kelly stated: *"that if I hadn't come up here, he would have a cinch to win his lawsuit."* That he, Evans, suggested to Kelly that if his appearence might cramp his style, he could dismiss the suit against his clients; that Kelly then stated that he had no authority to dismiss any parties, but that he could make some sort of arrangement not to enforce payment from Evans' clients; *that Kelly then agreed with him as attorney for his several clients that if he did not press his defense, he would not make any further attempt to enforce collection of any assessment against his clients.* That in other words, Kelly agreed to "release my clients from any further obligation to pay additional premiums or assessments if I wouldn't bear down on the presentation of my defenses." That they then

discussed how this sort of agreement could be worked successfully; that it was then agreed that if Kelly was awarded a judgment in his class suit, that a judgment would be taken against Evans' clients, but that no effort would be made to enforce a collection from such clients in any manner, nor would Kelly later file a suit to enforce collection against them; that the trial consumed about two and a half or three hours; that he then communicated the fact of the trade to his clients; that after March 8, 1941, Kelly did not make any demand of the payment of the assessment liability established by the judgment in cause No. 63621; that after April 8, 1941, one of his clients received a notice from Kelly asking that a remittance be made, and he brought this notice to him and he wrote Kelly a letter calling his attention to the agreement, and thereafter the client received no further notices; that he personally had claim against the National Indemnity Underwriters; that it was for salary and traveling expense in the sum of approximately $400.00; that he represented four clients, having satisfactorily effected a compromise settlement in their behalf; he had no further interest in the outcome of the lawsuit against the other defendants. (R. 284-290

The witness, Willis Gresham, testified that he was an attorney, and that he represented Riddle Oil Company, Harry Joseph and T. B. Hill; he attended the trial of that suit; that he settled the claim of Riddle Oil Company and the claim against T. B. Hill; that prior to the trial, he tried to dis-

cuss settlement with Keith Kelly; that the Harry Joseph claim was still pending; that he did not introduce any evidence at the trial of the case; that his three defendants were all domiciled in Travis County; that Kelly discussed the fact with him if he settled in advance of the trial, he could not hold venue in Travis County; that Kelly told him "I am not going to settle with you because, among other reasons, I want venue to remain in Travis County, and I am going to attempt to hold it here, and if I settle with you, then I might not be in such good position as I otherwise would."; that he subsequently settled by paying Kelly two-thirds of the Hill claim, and about one-fourth of the Riddle Oil Company claim. (R. 383-388).

The foregoing is sufficient to disclose the manipulations that took place.

We assert that the Receiver, with design, stifled the defense in the class suit. He had instituted an original suit against 193 defendants, naming as defendants Sid W. Richardson, Richardson Oils, and Houston Transportation Company, petitioners herein, each of whom have assumed a large and responsible burden in the instant case. When these named defendants, together with others, began to assert a vigorous defense to this suit, the Receiver dismissed it. Months after, he filed Cause No. 63621. He deliberately omitted to sue petitioners who had contested his first suit and named in this cause only twenty-eight defendants as representatives of the 3200 subscribers. Of the twenty-eight

selected, only one had a purported liability in excess of $500.00. Ostensibly, these named defendants were supposed to represent absent members of the class, whose liabilities exceeded Four Hundred Thousand ($400,000.00) Dollars. Practically half of the named defendants made default. Of those remaining the Receiver conducted settlement negotiations with twelve. On the very day the cause was tried he reached an agreement with an attorney representing a named defendant and three interveners, that if he would not resist the suit that no writs of execution would ever be issued against his clients. In the ultimate analysis the Receiver so guided the proceedings that only one man, Harry Joseph, with an assessment liability of $18.00 remained to present a defense and perfect an appeal.

We assert to the Court that the Receiver in conducting settlement negotiations with a single one of these so-called representative defendants, was guilty of misconduct which prevented a full and fair defense of this case, and which brings it within the condemnation of the Supreme Court of the United States. In all events, when the day of the trial came and the Receiver reached an agreement with one named defendant, and the three intervening defendants, that if they would not resist the procurement of the class judgment, that he would refrain from getting out an execution against them, surely it cannot be said that such procedure fairly insured the protection of the interest of the absent parties who are now held to be bound by the judgment rendered.

The method adopted by the Receiver violates every principle of class suits. He selected the named representatives. We do not believe that he could have a valid class suit where he deliberately selects those whose interests are so small that they cannot afford to defend. In that sort of a situation they cannot be depended on to bring forward the merits of the controversy. But even if we are wrong in that assertion we are sure that he cannot tamper with those named defendants; we submit he cannot offer settlement to a single one. If so, he can settle with all, and thus destroy the class. Surely he cannot offer settlements to all who evidence a purpose to make a defense as was done in this case, and have a valid class suit.

The Supreme Court of Texas in its majority opinion, has referred to the recitation appearing in the original class judgment to the effect that the 3200 absent members of the class were "fairly and truly represented herein by the named defendants." This bare recitation in the judgment is held in the majority opinion to be conclusive that the conduct of the Receiver effected no vice in the class judgment. The dissenting opinion, after detailing the uncontroverted testimony, holds that those of the defendants who remained in the case after all the manipulations of the Receiver, did not fairly represent the interest of the absent members of the class, and that the judgment thus secured was void.

This Court in the *U. S. of America vs. Dick Johnson*, 319 U. S. 302, held:

"That interest has been adjudicated in a proceeding in which the plaintiff has had no active participation, over which he has exercised no control, and the expense of which he has not borne. He has been only nominally represented by counsel who was selected by appellee's counsel and whom he has never seen. Such a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated — a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court. Chicago & G. T. R. Co. vs. Wellman, 143 US 339, 36 L. Ed. 176, 179, 12 S Ct 400; and see Lord vs. Veazie, 8 How (US) 251, 12 L ed 1067; Cleveland vs. Chamberlin, 1 Black (US) 419, 17 L ed 93; Bartemeyer v. Iowa, 18 Wall. (US) 129, 134, 135, 21 L ed 929, 931; Atherton Mills vs. Johnson, 259 US 13, 15, 66 L ed. 814, 815, 42 S Ct 422. Whenever in the court of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them."

The adversary proceeding, the "honest and antagonistic assertion of rights" in behalf of absent members of the class is the very thing guaranteed by the constitution. There has been no adversary proceeding, there has been no honest and antagon-

istic assertion of any rights whatsoever in behalf of these petitioners in the prior litigation. The petitioners have never had their day in court. They have been deliberately deprived of their right to be heard and the judgment of the state court holding these petitioners bound by a judgment ignoring these constitutional requirements is basically unsound.

All the petitioners ask is that they be permitted, in a fair and openly conducted trial, to have their day in Court where they may openly contest and litigate every step essential to the establishment of liability against them, and where the burden of proof will be cast on the Receiver to prove up his case rather than on the Petitioners to disprove it as has been their burden on this Bill of Review.

Petitioners have demonstrated the invalidity of the class suit judgment in cause No. 63621. The judgment on the cross-action against these petitioners for the amount of their respective assessments is premised on the validity and binding effect of the class suit judgment. It follows, the class suit judgment being void, that the judgment on the cross-action is erroneous.

CONCLUSION

We respectfully submit that the decision of this Court in *Christopher vs. Brusselback*, *supra*, is decisive of the question presented in the first two points of this brief. The class suit device is not available in a suit to impose a several liability

against great numbers of absent persons who are to be bound by the judgment.

But even if the class suit was maintainable as such, there is something fundamentally wrong in the judgment of a state court which will allow the proponent of a class suit to conduct the litigation as the uncontroverted record in this case discloses the case to have been conducted.

It is such a judgment that we ask this Court to review.

Petitioners respectfully pray that this Honorable Court exercise its jurisdiction to grant a writ of certiorari to review the judgment of the Supreme Court of Texas, and for such other orders and relief as may be appropriate.

Respectfully submitted:
John M. Scott
John M. Scott, Attorney at Law,
1605 Fair Building,
Fort Worth, Texas.
Attorney for Petitioners.

SAM DARDEN,
Liberty Building,
Waco, Texas.
SAM R. MERRILL,
Bankers Mortgage Bldg.,
Houston, Texas.

MILBURN E. NUTT,
Staley Building,
Wichita Falls, Texas.
WILLIAM M. BROWN,
1605 Fair Building,
Fort Worth, Texas.

Of Counsel.

APPENDIX

TITLE 78

CHAPTER TWENTY

Indemnity Contracts

Art. 5024. May Exchange Contracts

Individuals, partnerships and corporations of this State hereby designated subscribers are hereby authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations of other States and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the law, excepting life insurance. (Acts 1915, p. 269).

Art. 5025. Attorney for Subscribers

Such contracts may be executed by a duly appointed attorney in fact, duly authorized and acting for such subscribers. The office or offices of such attorney may be maintained at such place or places as may be designated by the subscribers in the power of attorney.

Art. 5026. Declaration of Subscribers

Such subscribers, so contracting among themselves, shall, through their attorneys, file with the Commissioner a declaration verified by the oath of such attorney setting forth:

1. The name or the title of the office at which

subscribers propose to exchange such indemnity contracts. Said name or title shall not be so similar to any other name or title previously adopted by a similar organization, or by any insurance corporation or association, as in the opinion of such Commissioner is calculated to confuse or deceive. The office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or inter-insurance exchanges.

2. The kind or kinds of insurance to be effected or exchanged.

3. A copy of the form of policy, contract or agreement under or by which such insurance is to be effected or exchanged.

4. A copy of the form of power of attorney or authority of such attorney under which such insurance is to be effected or exchanged.

5. The location of the office or offices from which such contracts or agreements are to be issued.

6. That applications have been made for indemnity upon at least seventy-five separate risks, aggregating not less than one-half million dollars as represented by executed contracts or bona fide applications to become concurrently effective, or in case of liability or compensation insurance, covering a total payroll of not less than two thousand employes.

7. That there is on deposit with some State or National Bank as a depository for the payment or

losses not less than the sum of ten thousand dollars. (Id.)

Art. 5027. Service of Process

Concurrently with the filing of such declaration, the attorney shall file with the Commissioner of Insurance an instrument in writing, executed by him for said subscribers, conditioned that, upon the issuance of certificates of authority hereinafter provided for, service of process may be had upon such Commissioner in all suits for this State arising out of such policies, contracts or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney. Three copies of such process shall be served, and the Commissioner shall file one copy, forward one copy to said attorney, and return one copy with his admission of service. (Id.)

Art. 5028. Statement of Indemnity

Such attorney shall file with the Commissioner a statement under the oath of such attorney showing the maximum amount of indemnity upon any single risk, and such attorney shall, whenever and as often as the same shall be required, file with such Commissioner a statement cerified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least one hundred thousand subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount

greater than ten per cent of the net worth of such subscriber. (Id.)

Art. 5029. Reserve

There shall at all times be maintained as a reserve a sum in cash or convertible securities equal to one-half of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements for expenses and reinsurance. Said sum shall at no time be less than ten thousand dollars, and if at any time one-half of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. (Il.)

Art. 5030. Financial Report

Such attorney shall make an annual report to the Commissioner for each calendar year, which report shall be made on or before March 1st, for the previous calender year ending December 31, showing the financial condition of affairs at the office where such contracts are issued is in accordance with the standard of solvency provided for herein, and shall furnish such additional information and reports as may be required to show the total premiums or deposits collected, the total losses paid, the total amounts returned to subscribers, and the amount retained for

expenses. Such attorney shall not be required to furnish the name and address of any subscriber. The business affairs and assets of said reciprocal or interinsurance exchanges, as shown at the office of the attorney thereof, shall be subject to examination by such Commissioner. (Id.)

Art. 5031. Any Corporation May Exchange

Any corporation now or hereafter organized under the laws of this State shall, in addition to the rights, powers and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporations are organized and as much granted as the rights and powers expressly conferred. (Id.)

Art. 5032. Certificate of Authority

Each attorney by whom or through whom are issued any policies of or contracts for indemnity of the character referred to herein shall procure from the Commissioner annually a certificate of authority stating that all of the requirements have been complied with and, upon such compliance and the payment of the fees required by this law, the Commissioner shall issue such certificate of authority. Such Commissioner may revoke or suspend any certificate of authority issued hereunder in case of breach of any condition imposed by this law after reasonable written notice has been given said attorney so that he may appear

and show cause why action should not be taken. Any attorney who may have procured a certificate of authority hereunder shall renew same annually thereafter. Any certificate of authority shall continue in effect until the new certificate of authority be issued or specifically refused. Such attorney shall pay a fee for the issuance of the certificate of authority herein provided or the sum of twenty dollars, which shall be in lieu of all license fees and taxes of whatsoever character in this State. (Id.)

Art. 5033. When Insurance Law Applies

Except as herein provided, no insurance law of this State shall apply to the exchange of such indemnity contracts unless they are specifically mentioned. (Id.)